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Federal Communications Commission
Office of Secretary

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February 28, 1997

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: MM Docket No. 95-176

Dear Mr. Caton:

Enclosed for filing in the above filed proceeding please find an original plus four copies of the Comments of AlphaStar Television Network Inc.

Thank you for your attention and consideration.

Very truly yours,



Mark C. Ellison

Enclosure

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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FEB 28 1997

Federal Communications Commission
Office of Secretary

In the Matter of)	
)	
Closed Captioning and Video Description)	
of Video Programming)	
)	MM Docket No. 95-176
Implementation of Section 305 of the)	
Telecommunications Act of 1996)	
)	
Video Programming Accessibility)	
_____)	

**COMMENTS OF
ALPHASTAR TELEVISION NETWORK INC.**

AlphaStar Television Network Inc. ("AlphaStar") hereby submits its comments in the above referenced proceeding (the "NPRM") which seeks to establish rules for the implementation of closed captioning in accordance with the provisions of section 713 of the Communications Act of 1934 (the "Act").

I. SUMMARY

AlphaStar is one of the "service providers" upon which the Commission would place primary responsibility for the implementation of closed captioning. While AlphaStar strongly supports the availability of closed captioning to the greatest practical degree and commends the Congress and the Commission for its concern and effort in this regard, it is deeply concerned by the direction taken in this proceeding. As will be shown in these comments, AlphaStar and similar direct broadcast service providers are neither positioned to function as the parties ultimately responsible for closed captioning nor to

impose such burden on the suppliers of programming services carried on the direct broadcast satellites.

The Commission's fundamental plan is one whereby the distributors or service providers would bear the regulatory burden with the expectation that actual responsibility would be borne by the programming producers and suppliers through a transference from the service providers. However, even if the burden on the service providers is to some degree illusory, one must look at these proposed rules as *in fact* placing the responsibility for closed captioning on the service providers (i.e., the distributors). Whether the Commission is looking to actually impose the burden of closed captioning on the service providers or looking to the service providers to transfer the burden to programming suppliers and producers, significant, if not insurmountable, hurdles would be faced by the service provider in meeting the objective.

The Commission's planned regime of closed captioning, to the extent it places the responsibility or liability for compliance on service providers, is misguided. If the plan assumes the assignment of responsibility from the service providers to the programming producers, then the barriers of existing long term contractual arrangements and/or the lack of a contractual relationship with the rights holder will frustrate that plan. On the other hand, if the service providers are themselves to be compelled to comply, then (a) monumental copyright and liability issues exist which, to date, have not been adequately addressed in either the Act or the proposed rules; and (b) because a DBS provider, such as

AlphaStar, transmits thousands hours of programming daily, the costs of effectuating closed captioning would be devastating.

II. INTRODUCTION: ALPHASTAR - SCOPE OF DISTRIBUTION SERVICE

AlphaStar is a Delaware corporation, wholly owned by Tee-Comm Electronics Inc. of Milton, Ontario (“Tee-Comm”). It operates as a direct-to-home (“DTH”) satellite television service provider from medium powered Ku-band transponders leased from AT&T on the Telstar 402R satellite in the fixed satellite service (FSS) frequency¹. AlphaStar provides satellite television reception equipment through its parent company, Tee-Comm, and delivers more than 100 channels of video and audio programming to private individual households and commercial locations throughout the United States and its territories, including Puerto Rico and the U.S. Virgin Islands. AlphaStar is a multichannel video programming distributor (MVPD) and a “service provider” as referred to in the NPRM. It stands to be significantly affected, if not harmed by the rules potentially emerging from this proceeding.

Presently, AlphaStar has license agreements with virtually every major premium and basic programming vendor, including Showtime Networks, HBO, ESPN, Turner Broadcasting, The Disney Channel, and dozens more. It also distributes networks and superstations as a satellite carrier. In addition to its line-up of mainstream television

¹ In mid-1997, AlphaStar will migrate from the AT&T 402R satellite to AT&T’s T-5 satellite which will launch in early 1997.

programming, AlphaStar also delivers several channels of specialty programming including Asian, Hispanic, and Arab language television. The Real Estate Television Network is carried on AlphaStar and a number of additional specialty and business television services will soon join the AlphaStar line-up. AlphaStar also carries 30 channels of digital music service (i.e., audio only). All-in-all, the video programming of AlphaStar consists of some 75 channels of basic and premium service, 10 channels of pay-per-view, and, at any given time, 6 to 10 business or specialty channels. Hence, on average, AlphaStar is distributing approximately 2000 hours of video programming every day. After AlphaStar migrates to T-5, its channel capacity and the number of hours of total programming will expand significantly.

While AlphaStar applauds the Congress and Commission for its concern and desire to expand the reach of closed captioning, extreme caution in the implementation of the rules pertaining to closed captioning is urged. During the past decade there has been an unprecedented increase in the number of video programming services. This expansion has brought new and exciting television to the market, with greater diversity than anyone might have imagined a decade ago. As the Commission well knows, there has also been rapid development and deployment of new technologies for the distribution of these programming services. DTH service in the BSS, Ku-band FSS, and C-band frequencies have literally exploded onto the consumer scene in the past decade, with DBS service being the fastest growing consumer electronics product in history. AlphaStar is deeply concerned that the regulatory burden the Commission is seeking to place on the shoulders

of DBS service providers and programming suppliers could impede the continued growth of both technology and programming. The economic encumbrance of closed captioning is tremendous and the potential impact for both programmers and MVPDs is enormous.

III. RESPONSIBILITY FOR CLOSED CAPTIONING

The Commission has proposed that the burden for closed captioning be placed upon “all entities who provide video programming directly to a customer’s home.”² Such entities would include AlphaStar and all other DBS service providers. The Commission states its belief that those entities will, in turn, impose the burden on programming producers through the service providers’ ability to refuse to purchase that which is not captioned. However, despite that recitation, the rules proposed do, in fact, place primary and ultimate regulatory responsibility for closed captioning on the distributors of programming. That approach, in a nutshell, is impractical and illogical. While AlphaStar and other DBS service providers are technically capable of passing closed captioning through their respective delivery systems (and do, in fact, pass closed captioning at the current time), they cannot be the source of such captioning and they should not bear the regulatory liability for ensuring that the programming they acquire for distribution will be closed captioned.

It is essential, and altogether logical, that the responsibility for and burden of closed captioning fall on the programming producers. A programming distributor or

² NPRM at Paragraph 28.

“service provider” does not have and likely never will have the rights to overlay closed captioning on the programming it licenses from the producers and suppliers. Further, from a practical standpoint, there is no way that a distributor such as AlphaStar could itself provide closed captioning on the vast amount of programming it carries as a digital MVPD.

There are significant problems with the Commission’s concept that the service provider will, in effect, transfer the burden to the programming producer. Generally, the licenses which are granted to AlphaStar by the programming suppliers contain general restrictions which would prevent AlphaStar from implementing closed captioning.³ Absent the consent of the supplier or appropriate rights holder, AlphaStar simply does not believe captioning can be done without incurring potential liability.

Furthermore, the party in whom rights to close caption exist may be several layers removed from the programming supplier with whom AlphaStar may have dealt. For example, assume that HBO is airing “Hunt for Red October” and AlphaStar is retransmitting that movie on its DBS system, by virtue of contract restrictions pertaining to such retransmission, AlphaStar would have no right to place *any* words on the screen while that movie is airing. Secondly, and perhaps of greater significance, AlphaStar would hold no rights to “publish” the dialogue contained in the movie in any form other than as licensed from HBO. In turn, HBO may not have rights to provide closed

³ We are not particularly referring to express contract language barring closed captioning as referenced in NPRM at Paragraph 6, but rather general contract terms that require the distributor to retransmit the programming in its entirety as delivered to the distributor without deletion or modification.

captioning or to grant rights to AlphaStar to provide closed captioning. Going up yet another step in the distribution chain, the studio producing and distributing “Red October” may not have such rights. Quite possibly, the rights would need to come from Tom Clancy, the author of “Hunt for Red October”; the words are his and any “performance” of the dialogue without his express permission might constitute copyright infringement. How then can the Commission impose a burden (regardless of whether or not the Commission expects that burden to be transferred) on a party who cannot meet that burden without being in violation of the law? Yet, that is what the proposed rules would do.

The Commission suggests that the service provider “refuse to purchase” programming which is not captioned and suggests that its “rules will result in video programming providers incorporating such requirements into their contracts with video producers and owners”⁴. First, if the object of these rules is to place the obligation on the programming producer, why not place the regulatory burden there? Furthermore, the Commission’s assumption that the burden can be transferred in the near term does not hold true in view of the long term carriage agreements already in place between AlphaStar and its programming suppliers. Those agreements extend well beyond the dates for compliance for new materials as referenced in this Notice. Most of the AlphaStar programming agreements are for terms of at least five years (running to the year 2000 or 2001) and several programming agreements are for terms of ten years (running to 2005 or 2006). In the majority of cases, AlphaStar will be in no position to

⁴ NPRM at paragraph 30.

re-negotiate carriage agreements until well into the next century. Under these existing agreements, AlphaStar has no discretion to accept or reject the purchase of certain programs and, in most cases, it is contractually bound to carry *all* of a programming supplier's service, without exception. Whether AlphaStar could, under *force majeure* or similar provisions, black out any non-captioned program which is subject to the rules is debatable.⁵ AlphaStar simply lacks the latitude to compel a programming supplier to comply with the rules and it will not have that ability for the next five to ten years.

Hence, AlphaStar (along with other DBS providers) face the potential of being in a position where it cannot: (i) force its suppliers to close caption; (ii) black out non-complying programming without being in breach of contract; nor (iii) insert closed captioning because of copyright and contractual restrictions, not to mention costs.

As the Commission has noted, there are substantial costs associated with the preparation and transmission of closed captioning. Imposing the costs of closed captioning on AlphaStar or any multichannel provider in view of the thousands of hours of programming transmitted would be enormous and crippling. If just one-half of AlphaStar's programming was subject to closed captioning, that would entail captioning approximately 1000 or more hours of programming per day. If the average cost of such captioning was \$500 per hour⁶ the total cost per day would be \$500,000, with an

⁵ Irrespective of any such blackout, AlphaStar would be required to pay its normal license fees. Hence, the company would be paying for programming it could not deliver to its customers.

⁶ According to the NPRM closed captioning costs range from \$120 to \$2500 per hour. NPRM at paragraphs 18 - 22.

annualized costs of \$182,500,000. Even if 90% of that economic burden were borne by the programming producers and 10% by AlphaStar, that would leave AlphaStar with a cost of nearly \$20 million per year. As a relatively small “niche” player in the DBS market, such a burden would be devastating.

Virtually without exception, unless the program producer or supplier is willing to voluntarily assume the responsibility for meeting the Commission’s suggested captioning schedule, the objectives cannot and will not be met. Placing the obligations on distributors, such as AlphaStar, serves no purpose and does not ensure that the congressional purpose will be achieved. The burden must fall on the rights holders and programming suppliers, not the distributors. And that burden should not exist through the transference of responsibility from the distributor; it should reside in the programming producer *ab initio*.

IV. EXEMPT PROGRAMMING

(i) **Limited Distribution and New Services.** The Commission should establish a minimum threshold generally exempting any network or programming supplier which has total industry distribution to viewers or subscribers of less than some specified number of U.S. households⁷. Significant entry barriers already exist in the form of production and transmission costs for new programming services (as well as limited channels of distribution). If the Commission’s closed captioning rules encompass any

⁷ It is suggested that minimum threshold should be in the range of 30 to 50 million households.

and all new programming services, such rules would clearly have a chilling effect on the development of new services. Most new programming services operate at a loss for several years. The money needed to launch a new programming service is difficult to find. If a programming service is required to caption its programming 24 hours a day at a cost of \$500 per hour, it is facing additional costs of \$12,000 per day. Rarely, if ever, does a programming service launch with a significant paying subscriber base and advertising revenue such that it could afford the costs of captioning at launch or even during the first years of operations.

(ii) Business and Private Networks. The Commission should exempt from closed captioning requirements all satellite transmitted programming services which are in the nature of private or business television services not intended for reception by the general public. AlphaStar makes transponder capacity available to corporations, associations and other entities to reach the employees, members, customers, vendors, and the like of such entities. Those private broadcasts should not be captured by the closed captioning rules. The entities leasing such capacity and providing such programming should be permitted the discretion to serve those in need of closed captioning. The market for private and business television networks is new and rapidly expanding. Requiring closed captioning on such services would virtually bring an end to that market.

(iii) Foreign Language Programming. AlphaStar urges the Commission to exempt all foreign language service from the closed captioning rules with the possible

exception of Latin-based language services meeting the threshold audience minimums as suggested in subparagraph (i) above. AlphaStar currently carries Asian (from the Indian subcontinent), Arabic, and Spanish language programming. Plans are under consideration to add more foreign language services. Ultimately, AlphaStar intends to provide one of the broadest offerings of ethnic programming services available in the market. Generally, the entities supplying foreign language services to AlphaStar have limited resources both in terms of financing and production. In many cases, they have acquired programming rights from foreign producers and, in most cases, the concept of closed captioning was not contemplated in such grant of rights. Hence, in addition to costs issues, significant rights and international copyright issues pervade the issue of closed captioning in the foreign language services market. Each particular market for ethnic services, although important and deserving of the specialized programming, is limited in size and, unfortunately, often on the lower ends of the American economic strata. The imposition of closed captioning requirements on these services will, in all likelihood, drive the suppliers from the market or drive up production costs to the point that such audiences will not be served.

AlphaStar cannot undertake efforts to expand the availability of foreign language services and at the same time turn around and demand of the suppliers of such programming that it be closed captioned or refuse carriage. Those suppliers simply cannot meet the burden. AlphaStar itself cannot assume the burden in view of the

difficulties of translation (and corresponding shortage of qualified translators/transcription technicians) and the costs associated with such transcriptions.

The Commission is correct in its statement that the closed captioning capability of U.S. televisions would not permit the transcription of non-Latin-based languages. However, the limited potential audiences for satellite delivered foreign programming dictates that even Latin-based languages should be exempted unless the actual subscriber base is such that the costs can be supported. At this time, all foreign language services should be excluded from mandatory closed captioning. Foreign language programming providers will, if the market demands and justifies closed captioning, find ways to implement such service over time. It should and must be left to the market. To mandate closed captioning on foreign language services will do nothing but ensure that a full range of foreign language services will forever be kept from the American public.

(iv) Additional Exemptions. AlphaStar submits that the following services should be exempt from closed captioning: (a) programming that is primarily textual in nature; (b) leased access programming, including nonprofit educational and informational programming which may ultimately meet the DBS public service obligations; (c) instructional programming (including private and business television); (d) advertising; (e) interstitial and promotional advertisements (which are, in any event, generally accompanied by text); (f) political advertising; (g) music programming.

V. CONCLUSION

The plan to impose responsibility for closed captioning on service providers is misplaced. The burden should be on the programming supplier directly and not through transference from the service provider. AlphaStar cannot carry the burden of closed captioning. It has no ability to compel its suppliers to provide closed captioning. It cannot undertake the task of closed captioning itself due to contractual, copyright, liability, and economic barriers.

The Commission is therefore respectfully urged to reconsider its basic premise and to fashion rules that will expand the availability of closed captioning through regulation of the non-exempt programming producers.

Respectfully submitted,

ALPHASTAR TELEVISION NETWORK INC.

A handwritten signature in dark ink, appearing to read 'MCE', is written over a horizontal line.

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Its Attorneys

February 28, 1997